No. 97-1316

(3)

Supreme Court, U.S.
FILED
JUN 22 1998

In The

Supreme Court of the United States

October Term, 1997

PANDA-KATHLEEN, L.P.,

Petitioner,

vs.

FLORIDA POWER CORPORATION and FLORIDA PUBLIC SERVICE COMMISSION,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Florida

BRIEF IN OPPOSITION FOR RESPONDENT FLORIDA POWER CORPORATION

JAMES A. McGEE
JEFFERY A. FROESCHLE
Office of the General Counsel
Florida Power Corporation
P.O. Box 14042
St. Petersburg, Florida 33733
(813) 866-5786

GARY L. SASSO
Counsel of Record
JAMES MICHAEL WALLS
CARLTON, FIELDS, WARD,
EMMANUEL, SMITH & CUTLER, P.A.
One Progress Plaza
Barnett Tower, Suite 2300
200 Central Avenue
St. Petersburg, Florida 33733
(813) 821-7000

Attorneys for Respondent Florida Power Corporation

145206

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, Inc.

QUESTION PRESENTED

In framing the supposed "Question Presented," Petitioner Panda-Kathleen, L.P., incorrectly states the nature of the relief sought and granted in the proceedings below. Florida Power did not ask the Florida Public Service Commission to "rewrite" and thereby "invalidate" the parties' contract. Instead, it asked the Commission to resolve the parties' dispute about the rules the Commission adopted to implement the Public Utilities Regulatory Policies Act of 1978 ("PURPA"). Those rules governed the Commission's approval of Panda's contract, and they were expressly incorporated as terms of that contract. Florida Power merely sought to have Panda comply with those rules and with PURPA, and that is all the Commission ordered below.

As a result of its material mischaracterization of the decisions below, Panda poses a "Question Presented" that is not presented by those decisions. Rather, the only question presented by them is:

> Whether the decisions below, which hold that Panda must comply with PURPA and the Commission's rules implementing PURPA, constitute "utility type" regulation preempted under PURPA.

STATEMENT PURSUANT TO RULE 29.6

The parent company of Respondent Florida Power Corporation is Florida Progress Corporation and the following are its nonwholly owned subsidiaries:

Dixie Fuels Limited
Dixie Fuels II, Limited
Dulcimer Land Company
Electric Fuels Corporation
Elmwood Fleet, Inc.
Energy Services Projects
Gateway Joint Venture (Carillon)
Hatfield Dock & Transfer, Inc.
Hatfield Terminals, Inc.
Health Progress Joint Venture
HEB Partners
Highpoint Center Partners, Ltd.
Homeland Coal Company, Inc.
I.M.T. Land Corp.
International Marina Terminals Partnership
Kentucky May Coal Company, Inc.
Kodiac Coal Company, Inc.
Lake Port Properties
Lakeside Properties
Little Black Mountain Coal Reserves, Inc.
Little Black Mountain Land Company
Marine Equipment Management Corporation
Marine Equipment Towing Corporation
Meridian Land Company
Mid-Continent Life Insurance Company

TABLE OF CONTENTS

	Page
Question Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Citations	iii
Statement of the Case	1
A. Introduction.	1
B. PURPA and The Parties' Standard Offer Contract.	2
C. The Commission's Proceeding.	4
D. The Florida Supreme Court's Decision.	6
Reasons for Denying the Writ	7
Conclusion	11

TABLE OF CITATIONS

Cases Cited:

Crossroads Cogeneration Corp. v. Orange and Rockland Utilities, Inc., 969 F. Supp. 907 (D. N.J. 1997) 10

Contents

Page

FERC v. Mississippi, 456 U.S. 742 (1982) 6, 7, 8, 10

Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners, 44 F.3d 1178 (3d Cir. 1995) 9, 10

Indeck-Yerkes Energy Services, Inc. v. Public Service Com'n of State of N.Y., 564 N.Y.S. 2d 841 (N.Y. A.D. 3d 1991) 10

West Penn Power Co. v. Pennsylvania Public Utility Commission, 659 A.2d 1055 (Pa. Commw. 1995) . 10

Statutes Cited:

16 U.S.C. § 2633 8

Public Utilities Regulatory Policies Act § 210(a) 2

Public Utilities Regulatory Policies Act § 210(f) 3, 6

Rules Cited:

Florida Administrative Codes 25-17.080 through 25-17.091 3

Florida Administrative Code 25-17.0832(3)(a) 3

Florida Administrative Code 25-17.0832(3)(e)6 3

STATEMENT OF THE CASE

A. Introduction.

In November 1991, Petitioner Panda-Kathleen, L.P. ("Panda") entered into a contract with Florida Power Corporation ("FPC") by which Panda agreed to build a power plant and supply electricity to FPC. The parties entered into their agreement in accordance with the rules of the Florida Public Service Commission ("Commission") implementing the Public Utilities Regulatory Policies Act of 1978 ("PURPA"), and those rules were incorporated by reference into the contract. A dispute arose concerning the Commission's rules, and the parties each filed petitions for a declaratory statement asking the Commission to resolve the dispute.

Acting on these petitions, the Commission interpreted its PURPA rules and resolved the dispute in FPC's favor. At the same time, the Commission extended the time that Panda had to build the plant and to commence providing electricity to FPC. The Florida Supreme Court affirmed the Commission's decision.

In its petition to this Court, Panda incorrectly asserts that "the Commission issued an order ruling that FPC's contract with Panda was *invalid*." (Pet. at 3) (emphasis added). Panda contends that the Florida Supreme Court

> approv[ed] Florida Power's attempt to escape its contractual duties under a cogeneration agreement that had been expressly approved by the Commission under regulations adopted to implement both PURPA and FERC's rules,

and Panda further contends that, by this supposed holding, the Court

> has transgressed upon the congressional mandate, and has announced a rule of law that irreconcilably conflicts with the decisional law announced by every federal and state court to have addressed the preemptive effect of PURPA.

(Pet. at 5). On this basis, Panda asks this Court to grant Panda's petition.

Panda's petition fundamentally mischaracterizes the decisions of the Commission and the Florida Supreme Court. They did *not* invalidate the parties' contract or allow FPC to "escape its contractual duties." To the contrary, FPC remained fully obligated under those decisions to purchase power from Panda in accordance with PURPA, and the Commission rules implementing PURPA, and the parties' contract. Accordingly, the issue that Panda purports to bring before this Court is not presented by the decisions below, which are in complete accord with congressional and regulatory directives and other decisional law.

B. PURPA and The Parties' Standard Offer Contract.

PURPA was enacted in 1978 as a measure to reduce the country's dependence on foreign oil. To achieve that goal, Congress sought to encourage the development of cogeneration and small power production facilities. (App., 78a). Specifically, Section 210(a) of PURPA directs the Federal Energy Regulatory Commission ("FERC") to promulgate rules to encourage the development of those alternative energy sources by requiring that every electric utility offer to purchase electricity from qualifying facilities ("qualifying facilities" or "QFs"). (App., 78a). In turn, however, PURPA provides that the rates for those purchases may not exceed the cost of the "electric energy which, but for the purchase from such [QF], such utility would generate

or purchase from another source," which is commonly referred to as the utility's "avoided cost." (App., 78a-79a).

Although QFs are provided a limited exemption from certain state regulation, they are *not* exempt from state laws and regulations *implementing* PURPA. (App., 79a-80a). Rather, Section 210(f) explicitly requires *each state* regulatory authority to implement FERC's PURPA rules. (App., 81a). Furthermore, FERC's rules exempt QFs only from state regulation respecting the "rates of electric utilities[] and . . . the financial and organizational regulation of electric utilities," (App., 97a), which is often described as the QFs' exemption from "utility-type regulation." FERC's rules specifically provide that this exemption does *not* apply to rules adopted by state regulatory bodies to *implement* PURPA. (App., 97a).

In Florida, the Commission implemented PURPA by enacting Rules 25-17.080 through 25-17.091, F.A.C. In order to provide a means by which "smaller" QFs can sell energy to utilities which have "superior bargaining power," the Commission's rules require all utilities to file standard offer contracts containing the terms for the purchase of electricity from small power producers with *facilities less than 75 MWs*. (App., 90a-94a, 31a). Certifying that it intended to construct a facility less than 75 MWs, Panda accepted FPC's "Standard Offer Contract for the Purchase of Firm Capacity and Energy from a Qualifying Facility less than 75 MW. . . ." Pursuant to the Commission's PURPA rules, the parties' contract was approved by the Commission on October 22, 1992. (App., 20a).

Under Section 1.1.5 of that contract, Commission Rules 25-17.080 through 25-17.091 were expressly incorporated and made a part of the contract. Among those rules was Rule 25-17.0832(3)(a), which expressly limits the contract to a facility "less than 75 megawatts. . . ." (App., 90a). Rule 25-17.0832(3)(e)6 was also incorporated, which provides that

> [a]t a *maximum*, firm capacity and energy shall be delivered for a period of time equal to the anticipated plant life of the avoided unit, commencing with *the anticipated in-service date of the avoided unit.*

(App., 91a-92a). (emphasis added). The contract expressly defines the life of this unit as *twenty* years, and it contains a 20-year capacity payment schedule.[1] [*See* Contract Appendix C, Schedules 2 & 3].

C. The Commission's Proceeding.

FPC filed a petition for a declaratory statement with the Commission when it became apparent that Panda intended: (i) to build a 115 MW facility rather than the 75 MW facility it had represented it would build; and (ii) to seek payments from FPC for an additional ten years beyond the twenty-year life of the avoided unit. FPC sought an order resolving the dispute relating to the Commission's implementation of PURPA. Specifically, it asked the Commission to declare that Panda would not comply with the Commission's PURPA rules if Panda built a facility larger than 75 MWs and, further, that FPC was only obligated to make payments to Panda for the twenty-year life of the avoided unit. (App., 102a). FPC did *not*, as Panda has misrepresented to this Court at page 2, footnote 1, seek to *rescind* the contract. (*Id.*).

Thereafter, Panda filed a motion for declaratory statement of its own, seeking a determination that its construction of the

---

1. After receiving the standard offer contract from FPC, Panda typed in an expiration date based on a thirty-year term rather than the twenty-year life of the avoided unit. This was the *only* change Panda attempted to make to the contract and, as both the Commission and the Florida Supreme Court pointed out, it was contrary to the explicit requirement of PURPA that FPC pay no more under the QF contract than its costs under the avoided unit.

contract was consistent with the Commission's PURPA rules. Panda later moved to dismiss the proceeding, however, contending that PURPA preempted the Commission's jurisdiction over the issues that FPC and Panda had brought before the Commission. The Commission denied Panda's motion, concluding that the relief requested did "not conflict with federal regulations [implementing PURPA] or subject Panda to 'utility-type' regulation" in contravention of the limited exemption from state regulation provided under PURPA and FERC's PURPA rules. (App., 32a).

Following an evidentiary hearing, the Commission held that its PURPA rules limited standard offer contracts to facilities less than 75 MWs in size. Hence, Panda could not build a 115 MW facility without violating that rule, which was the basis for the Commission's approval of Panda's contract in the first instance and was expressly made a part of that contract. (App., 40a). The Commission further held that FPC was responsible for payments to Panda for the twenty-year life of the avoided unit, as provided in the Commission's rules. To require payments for thirty years, as Panda urged, "would exceed the avoided cost of the unit identified in the standard offer" contract "in violation of both [PURPA] and [the Commission's] rules for [QFs], which were implemented to ensure that utilities pay no more than the avoided cost to purchase capacity and energy from" such facilities. (App., 41a-42a).

Most significantly, and contrary to Panda's assertion (Pet. at 3, 10, 12-13), the Commission did *not* rule that Panda's contract with FPC was "invalid" and it did *not* "excus[e] the utility's performance altogether." (App., 35a-76a). Quite to the contrary, both parties remained obligated under the Commission's order to perform their respective duties under the contract. Indeed, the Commission expressly granted *Panda's* request that it be given additional time to perform its contractual obligations.

D. The Florida Supreme Court's Decision.

The Florida Supreme Court affirmed the Commission's order, holding that PURPA "contemplated and authorized" the Commission's exercise of jurisdiction over the dispute regarding its implementation of PURPA. (App., 6a). The Court emphasized that this decision was consistent with "the federal and state legislative enactments as well as the judicial decisions applying the statutes," which required the Commission to "bear the responsibility of resolving such disputes." (App., 9a).

In particular, this Court concluded in *FERC v. Mississippi*, 456 U.S. 742, 760 (1982) that state regulatory bodies are to "open their doors" to adjudicate PURPA claims. In a discussion of the role of state regulatory bodies under PURPA — a discussion conspicuously omitted from Panda's petition — this Court noted that Section 210(f) required "each state regulatory authority . . . to implement FERC's rules" and, further, that FERC's rules allowed state regulatory bodies "latitude in determining the manner in which the regulations are to be implemented." *Id.* at 751. This Court concluded that Congress could have opted to preempt the states completely under PURPA but did not do so; rather, Congress left to the states the discretion to determine how best to apply FERC's PURPA rules and thereafter resolve disputes relating to their implementation of PURPA.

The Florida Supreme Court relied specifically on this Court's decision in *FERC v. Mississippi*. Because the Commission implemented FERC's rules by adopting rules of its own in addition to adopting FERC's PURPA rules, the Florida Supreme Court reasoned that

> it would be contrary to both federal and state statutory authority directing the cogeneration program to deny the Commission the power to

> construe the regulations it has adopted in furtherance of that program and to resolve conflicts concerning implementation of those regulations.

(App., 8a). The Commission's power to resolve conflicts regarding the implementation of its PURPA rules naturally followed from this Court's recognition in *FERC v. Mississippi* that the adjudication of such disputes under PURPA was the obligation of and "the very type of activity" commonly engaged in by state regulatory authorities. (App., 8a).

Finding that the Commission had properly construed its rules implementing PURPA, the Court affirmed the Commission's Order. In so holding, the Court emphasized that, under Panda's construction of those rules, the contract would have *violated* PURPA by requiring FPC to pay for capacity beyond the life of the avoided unit. (App., 11a).

REASONS FOR DENYING THE WRIT

This Court has held that, consistent with the provisions of PURPA and the FERC rules implementing PURPA, state regulatory authorities must implement PURPA and adjudicate disputes arising in connection with their regulations implementing PURPA. *FERC v. Mississippi*, *supra*. The Commission below did nothing more than resolve a dispute about its rules implementing PURPA. Faithfully applying this Court's decision in *FERC v. Mississippi*, the Florida Supreme Court held that the Commission was authorized under PURPA to resolve that dispute. That decision does not warrant review by this Court.

Panda relegates to a footnote the nature of the dispute between Panda and FPC under the standard offer contract. (Pet. at 2, n.1). In that aside, however, Panda concedes that its

construction of the contract was at odds with the Commission's rules implementing PURPA. (*Id.*). The Commission's resolution of that conflict — which resolution Panda repeatedly characterizes as "utility-type regulation" — is *not* that type of regulation at all. Nor did the Commission invalidate the contract and excuse FPC from its obligations, as Panda repeatedly charges. (Pet. 3, 10, 12-13). The commission's order could not be clearer in that regard.

The Florida Supreme Court concluded that the Commission had the right to resolve this dispute concerning the implementation of its PURPA rules:

> [w]e believe it would be contrary to both federal and state statutory authority directing the cogeneration program to deny the Commission the power to construe the regulations it has adopted in furtherance of that program and resolve conflicts concerning the implementation of those regulations.

(App., 8a). This conclusion "naturally flows" from *FERC v. Mississippi*, in which this Court ruled that PURPA allowed state regulatory commissions to adjudicate such disputes under PURPA. (App., 8a). As a result, the Commission had the responsibility to resolve the dispute over its rules implementing PURPA and, according to the Florida Supreme Court, correctly did so.[2]

---

2. Asserting that PURPA provides for judicial review of disputes "arising from Qf contracts" in the same manner that judicial review exists for parties to private contracts, Panda contends that the Commission's jurisdiction was preempted once it approved the Panda contract. (Pet. at 8). This is not, however, a simple dispute "arising from QF contracts." As the Florida Supreme Court expressly recognized, this is a dispute concerning the Commission's implementation of its rules under PURPA. (App., 8a). As such, PURPA permits judicial review in exactly the manner that the Florida Supreme Court reviewed the Commission's order. (App., 81a -82a); 16 U.S.C. § 2633.

The Florida Supreme Court correctly found Panda's authority to be inapposite. Discussing one of those cases, *Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners*, 44 F.3d 1178 (3d Cir. 1995), which Panda again relies upon in its petition, the Court specifically noted that "[i]n *Freehold*, the board was not construing and implementing its own [PURPA] regulations." (App., 9a). Rather, that case indisputably involved "utility-type regulation" because the Board sought to require a QF to agree to the reduction of the utility's payments, in order to benefit the utility's ratepayers. *Id.* at 1183. That attempt "to either *modify the* [*contract*] or *revoke* [*the Board's*] *approval*," the *Freehold* court concluded, was preempted "utility-type" regulation. *Id.* at 1192 (emphasis added).

The Florida Supreme Court agreed that such "utility-type regulation" was preempted. Recognizing, however, that the Commission here had not sought to "modify" or "revoke" this contract but rather was merely construing and implementing its own PURPA rules, the Court held that the Commission had not engaged in preempted "utility-type regulation." (App., 9a).

Panda attempts to bring its claim within the scope of the "utility-type regulation" addressed in *Freehold* by mischaracterizing the decisions below. Panda asserts as fact that the Commission "issued an order ruling that [FPC's] contract with Panda was *invalid*" and "*excusing the utility's performance altogether.*" (Pet. at 3, 10, 12-13) (emphasis added). Even a cursory review of the Commission's order reveals that Panda's assertions are false.

The Commission did not "invalidate" this contract. It remained in full effect, with *Panda* being granted additional time to perform its obligations under the contract. Further, far from "excusing [FPC's] performance altogether," the

Commission specifically declared that FPC was obligated to make payments for the life of the avoided unit. (App., 35a-76a).

In sum, the Commission enforced PURPA and its rules implementing PURPA — which were expressly made a part of the contract by FPC and Panda — when Panda put forth a construction of the contract in conflict with those rules. Since *FERC v. Mississippi*, *supra*, courts and regulatory bodies have specifically recognized this is within state regulatory authority. *See, e.g., Indeck-Yerkes Energy Services, Inc. v. Public Service Com'n of State of N.Y.*, 564 N.Y.S. 2d 841, 843 (N.Y. A.D. 3d 1991); *Crossroads Cogeneration Corp. v. Orange and Rockland Utilities, Inc.*, 969 F. Supp. 907 (D. N.J. 1997).

As such, this case is very different from the cases Panda cites in its petition. All of the cases relied upon by Panda involved an effort to *terminate* or *modify* a previously approved contract, through "utility-type regulation." They do not address the states' jurisdiction to determine the very different type of issue presented here. For example, in *West Penn Power Co. v. Pennsylvania Public Utility Commission*, 659 A.2d 1055 (Pa. Commw. 1995), as in *Freehold*, the Commission had *not* been asked to enforce its rules implementing PURPA. Instead, the Commission was asked to *rescind* its prior order approving the contract, relief that clearly was preempted under PURPA. *Id.* at 1066. That was simply not the case here.

CONCLUSION

The Florida Supreme Court correctly held that the Commission had jurisdiction "to construe the regulations it has adopted in furtherance of [the PURPA] program and resolve conflicts concerning the implementation of those regulations." (App., 8a). The petition should be denied.

Respectfully submitted,

GARY L. SASSO
Counsel of Record
JAMES MICHAEL WALLS
CARLTON, FIELDS, WARD,
EMMANUEL, SMITH & CUTLER, P.A.
One Progress Plaza
Barnett Tower, Suite 2300
200 Central Avenue
St. Petersburg, Florida 33733
(813) 821-7000

JAMES A. McGEE
JEFFERY A. FROESCHLE
Office of the General Counsel
Florida Power Corporation
P.O. Box 14042
St. Petersburg, Florida 33733
(813) 866-5786

Attorneys for Respondent
Florida Power Corporation